BRIEF IN SUPPORT OF PETITION.

I. Opinion Below.

The opinion of the Supreme Court of the State of South Carolina filed March 29, 1943, re-hearing denied May 11, 1943, is reported in 25 S. E., 2d., 492; —— S. C., ——, and is found in this record at page 175.

II. Basis of Jurisdiction.

This has already been discussed under the same heading in the petition. If the errors complained of herein are substantial, petitioner has been denied due process as guaranteed under the 14th Amendment of the United States Constitution:

Lisenba v. *California,* 314 U. S. 219.
Moore v. *Dempsey,* 261 U. S. 86.
Powell v. Alabama, 287 U. S. 45, 68.
Baldwin v. *Hale,* 1 Wall. 223, 233.
Cf. Twining v. *Jersey,* 211 U. S. 78, 110.
Betts v. *Brady,* 86 Law. Ed., 1116, 1120.
Betts v. *Brady,* 86 Law. Ed. 1116, 1120, 62 Sup. Ct. 1252, 316 U. S. 455.
Palko v. State of Connecticut, 302 U. S. 325, 58 Sup. Ct. Rep. 151.
Amrine v. *Kines,* 131 F. (2d) 827, and U. S. Supreme Court cases therein cited and discussed.

The *Palko case, supra,* says:

> "On the other hand, the due process clause of the 14th Amendment may make it unlawful for a State to abridge by its statutes",

and we may ask if the same would not hold as to judicial decrees, "the right of one accused of crime to the benefit of counsel", citing the *Powell* case, *supra.*

Says the opinion (Palko):

> "In these and other situations immunities that are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th Amendment become valid as against the states."

In a state where trial by jury is not abolished; but, as in South Carolina, made inviolate by its constitution, would not Art. 6 U. S. Constitution have the same application? And Art. 5, U. S. Constitution the same, under the same conditions?

In *Brady, supra,* it is held that asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case.

The Constitution of the State of 1895, Art. 1, Sec. 5 (set out hereinafter), providing that citizens of the United States in South Carolina, should enjoy the equal protection of the laws and be not deprived of liberty without due process was a promise to every person accused of crime. The Federal Constitution guarantees to the citizen the same protection.

In *Smith* v. *O'Grady,* 312 U. S. 329, 61 S. Ct. 572, the Court said:

> "The constitution is the supreme law of the land, and upon the State Courts, equally with the Courts of the Union, rests the obligation to guard and enforce every right secured by that constitution."

To the same effect is *Mooney* v. *Holohan,* 294 U. S. 103, 113, 55 S. Ct. 340, 342, 79 L. Ed. 791. Hence, upon these authorities, petitioner contends that the Supreme Court of the State was not only duty bound to enforce the provisions of its own constitution, but those of the Federal Constitu-

tion, protecting the defendant in his constitutional right to due process and the equal protection of the law.

In South Carolina the exception to the Supreme Court is governed by *Sec. 6 of Rule 4, Code 1942, page 1435.* That rule reads:

> "Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and the mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should not be long or argumentative in form."

Construing this rule, the Supreme Court of this State has held:

> "Exceptions where not misleading are to be liberally construed. McMahan *v.* Walhalla Light, etc., Co., 102 S. C. 57, 60, 86 S. E. 194. See also State *v.* Atkins, 126 S. C., 459, 120 S. E. 487.
>
> "If such an examination of an exception as may be necessary to disclose that it is framed in violation of this rule also discloses that the exception clearly embraces a meritorious assignment of prejudicial error, the Supreme Court will ordinarily waive the breach of the rule and consider the exception, but otherwise the exception will not generally be considered. Jackson *v.* Carter, 128 S. C. 79, 121 S. E. 559."

(Code annotation to said rule, page 1435).

The case, however, of *State* v. *Griffin,* quoted from hereinafter, requires the court in case of felony to take notice of any error apparent upon the record

> "by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial". (124 S. E. 81, 129 S. C. 200).

Hence, it is not necessary in exceptions to the Supreme Court from rulings of the Trial Court, that the exceptions should point out whether the right is claimed under a statute, constitution, decision or common law. If there is merit in the exception, even though it violates the rule, the Court considers the exception; and if the charge be felony, as this is, the Court will consider an error in the record, even though no exception is taken thereto. In other words, this is a part of the due process enjoyed by an accused person on trial in South Carolina.

In the case of *Nickey* v. *State of Mississippi*, 54 S. Ct. 743, 292 U. S. 393, Mr. Justice Stone, speaking for a unanimous Court, said:

> "This case is here on appeal, section 237 of the Judicial Code (28 USCA sec. 344), from a decree of the Supreme Court of Mississippi allowing recovery of delinquent taxes assessed upon appellants' lands within the state and overruling their contention that the assessment of the tax and the decree for its payment infringe the due process clause of the Fourteenth Amendment. 167 Miss. 650, 145 So. 630, 146 So. 859. So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state supreme court, as required by its rules. Wall *v.* Chesapeake & Ohio R. Co., 256 U. S. 125, 41 S. Ct. 402, 65 L. Ed. 856; Staltonstall *v.* Staltonstall, 276 U. S. 260, 267, 48 S. Ct. 225, 72 L. Ed. 565; Cumberland Coal Co. *v.* Board of Revision of Tax Assessments, 284 U. S. 23, 24, 52 S. Ct. 48, 76 L. Ed. 146. We confine our opinion to the question thus discussed."

It being seen that the errors in the record of the conviction of petitioner are perfectly apparent, and that in a

felony case they would be considered without exception, and that if the State Court discusses the questions, this Court will review them, let us briefly turn to the exceptions raised on appeal to the Supreme Court. The first exception questions the admissibility of the testimony of Sheriff Henry. This the Court held inadmissible for at least two reasons. The second exception questions the refusal to grant a motion to suspend five minutes before time announced for adjournment, and a ruling ordering the defendant to take the stand. Pages of these exceptions and rulings are referred to in this record elsewhere. The former rulings of the Trial Judge were held improper by the Court in this case, and the rulings presented by the second exception are violative of both the State and Federal Constitutions and the statute law of the State, referred to herein. The exceptions clearly presented the rulings complained of, showing that they were not orderly procedure, and when the Supreme Court decided the case, the petition for rehearing again called these matters to the attention of the Court and urged the Supreme Court's inadvertence and again referred to the authorities and asked the Court if that was due process (ff. 722-738, Appendix). The authorities referred to were *Sec. 17, Art. 1, Constitution S. C., Sec. 18, Art. 1, Constitution S. C., Amendments 5 and 6 U. S. Constitution, Sec. 1011, Code 1942,* and the cases of *Town Council* v. *Owen* and *State* v. *Howard,* from both of which quotations are elsewhere in this petition.

The Supreme Court had considered all these constitutional provisions, both State and Federal, and said in its opinion:

> "The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of

his constitutional right, nor to testify if he chose not to do so" (R. 719).

In disposing of the petition for rehearing the Court said it was satisfied that no meritorious ground had been presented by the petition (R. 742).

On page 182, R. 714, is the precise language the judge used

> * * * "I am not going to lose this hour if I can help it; if you have anybody; if you have anybody else, we will go on. How about the defendant—are you going to put him up?
>
> "Mr. Brown: After the witness we will have, here is what we had in mind. We have eliminated a lot * * *
>
> "The Court: Put the defendant up—you've got an hour for that. Bring the jury back. (Jury returns) Proceed gentlemen."

"The rule of the Circuit Court, that being the Court in which the petitioner was being tried, provides:

> "Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard, and the opinion of the Court has been pronounced: *Provided,* No argument shall be had on any objection to the admissibility of evidence unless especially requested by the presiding Judge; nor shall one attorney interrupt another in the course of his argument without first obtaining the permission of the Court." Rule 11, page 1402 Code 1942.

This rule had been violated in that the Trial Judge did not let Mr. Brown state what he had in mind after hearing the witness he had, as he had a right to do under the rule itself, as well as under the Constitutions; but if Mr. Brown had undertaken to speak again he would have been guilty of contempt, the opinion of the court having been announced;

nor could any further argument be made on the admissibility of the evidence under the rule above mentioned.

The opinion of the State Supreme Court was that the evidence, after eliminating Sheriff Henry's testimony, was such as to convict before any honest jury. It being recalled that the jury under the South Carolina Constitution is the sole tribunal to try the facts, that Constitution being adopted in 1895 (S. C. Code 1942, page 1162), it was a denial to the petitioner of due process for the Supreme Court to adjudge petitioner guilty upon the evidence beyond a reasonable doubt, using as authority the case of the *State* v. *William Ford,* 3rd Strobart Law Reports, page 517, 34 S. C. Law, page 271, that decision having been decided on appeal from Spartanburg, Spring Term 1939, when the Judges could express their opinion upon the facts of the cases. But certainly, it is respectfully submitted, that if it is the province of the jury to weigh the force and effect of the testimony of an alleged accomplice, as in the law in South Carolina now, it is axiomatic that the Supreme Court cannot, being a law Court entirely, after eliminating the corroborative testimony of an accomplice (entwined with alleged confessions of the accused, in a three-cornered conversation with an officer, while under arrest), and thereupon adjudge of the strength and sufficiency of the remaining testimony to convict the accused.

In the case of *State* v. *Sowell,* 85 S. C. 278, the Supreme Court of the State, page 283, says:

> "Under our Constitution, the force and effect, or weight and sufficiency of testimony must be left exclusively to the jury, uninfluenced by any expression or intimation of opinion thereof by the Circuit Judge, who, however, has the power to correct any error into which they may fall, in the exercise of his discretion to grant new trials."

And the same case holds (page 281) that not since the Constitution of 1868 could a Judge express his opinion with

reference to the facts in a trial at which he is presiding; and that the testimony of an accomplice, whether corroborated or not, is exclusively for the jury. A distinction is made also between the Constitution of 1868 and that of 1895, to the extent that under the former the Judge might state the testimony and declare the law; but under the latter "Judges shall not charge juries in respect to matters of fact, but shall declare the law" (page 281, 85 S. C.).

Following the same theory of making the jury the sole judges of the force and effect of the testimony of an alleged accomplice, the General Assembly of South Carolina agreed to let persons convicted of, or pleading guilty to, felony, testify (such testimony having been incompetent before the passage of the act); but it carefully safeguarded the right of the accused. 1012-1 Code 1942 says:

> "No person shall be disqualified to testify in the trial of any cause in the courts of this State by reason of conviction and sentence for any crime. The fact of such conviction and sentence may be established and the credibility of the testimony of any such witness shall be entirely for the jury or the court determining the facts at issue, as the case may be. 1934 (38) 1193."

This was enacted in 1934 in order to let a felon who was an accomplice, when he was probably the only witness, prevent the failure of justice entirely; but it said that the weight and effect of such testimony is entirely for the jury in a jury case, or for the Judge in a case that is being tried without a jury, such as in the Courts of municipalities, and Justices of the Peace where there are no Constitutional provisions guaranteeing the accused the right of trial by a jury.

The promise in the State Constitution must be fulfilled. *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. Reports, 164.

The Fourteenth Amendment refers to all instrumentalities of the State, legislative, executive and judicial. Nor is

form all that is required; but substance as well. It is not important that the defendant neither filed nor offered to file a plea especially setting up or claiming a right under the Constitution. It is sufficient if it was claimed in the State Court in such manner as to bring it to the attention of that Court. *Chicago Burlington, etc.* v. *Chicago,* 166 U. S. 226.

Referring again to the case of the *State* v. *William Ford,* 3rd. Strob. Law (S. C.), page 527, it is interesting to note what those distinguished judges said about deciding the case on appeal on the evidence taken at the trial. And immediately following the quotation in the opinion, (ff. 709-710) is the following:

> "When even the prisoner's counsel confess their convictions of his guilt up on the other proof, how can there be any danger of erring in refusing a new trial under the rule just stated? * * *"

The rule applied in that case, even if it were applicable under the Constitutional Provisions of this State now, though we submit it is not, is a far cry from the record in this case. Even after petitioner was forced to the stand, seven defense witnesses were examined, even the ladies from Greenville, an adjoining County Seat, to support the alibi of petitioner, were sworn and examined. This fact of the great number of witnesses sworn, after Mr. Brown attempted to get the adjourment five minutes before the time previously fixed for adjournment, most of them bearing upon the alibi, a distinct angle in the case, demonstrates that the Supreme Court of the State, when it indicated that Mr. Brown had stated that the defendant would be offered after another witness, was entirely in error. The Court said "it appeared simply to be a question of putting the defendant on the stand before or after the witness who was expected to arrive" (f. 719). To get this construction

from the record, the Court would yet have to conclude that Mr. Brown had not completed his statement when he was interrupted by the Judge. It is true that the comma did not appear after the word "have" (f. 714). Mr. Brown's statement was that "after the witness we will have, here is what we had in mind.

"We have eliminated a lot * * *", and here he was cut off. If he had intended to say that he would put the defendant up after a witness he would have next day, he would not have concluded by saying that he had eliminated a lot, and stopped in the middle of a sentence. The fact is that he had several witnesses yet to put up. He evidently intended to put up one witness, and adopt a method that would shorten the length of the trial, for he talked of having eliminated a lot of something that he was not allowed to state.

III. Question Presented.

Whether under the undisputed facts and the law applicable thereto, petitioner has been denied due process of law and the equal protection of the laws under said 14th Amendment by the Supreme Court of South Carolina on appeal from the General Sessions Court of Spartanburg County, said State, the former having affirmed judgment of the latter and adopted the findings thereof as its own, in that

(a) The trial judge allowed the solicitor to prove by the sheriff of Spartanburg County over the objection of petitioner, the details of a conversation between petitioner and his co-defendant, the self-confessed perpetrator of the crime complained of, when the sole object of said inquisitorial conversations was for the purpose of incriminating the defendant, though highly improper and inadmissible for more than one reason.

(b) The trial judge erred in refusing to let petitioner's counsel make a motion and state the grounds thereof five

minutes before the time appointed for the adjournment of court, and thereupon, instead, ordering the defendant to take the stand and be sworn and examined, without advice or consent of counsel.

(c) The Supreme Court approved of the judgment and sentence upon the verdict of the jury after having held that the testimony of Sheriff Henry was improperly submitted to the jury for their consideration under their oath, as bearing upon the guilt or innocence of the accused, and substituted ther own findings upon the facts, after the elimination of such testimony, when said court, by the Constitution and Law of the State is confined to the settlement of questions of law entirely, thereby denying petitioner due process and the equal protection of the laws, although the record, especially the cross-examination of the defendant, bristled with prejudicial irregularities.

SUB-DIVISION A.

The opinion of the State Supreme Court in petitioner's case (R. 175) holds that Sheriff Henry's testimony was inadmissible, for more than one reason, a most important one being that he denied the incriminating statements made by Henrietta Henderson; the other reason mentioned by the court being that it violated the rule against hearsay. However, the court reasons that since the witness was ninth removed from the self-confessed perpetrator of the crime, and since his counsel had the privilege of cross-examination, the testimony had no effect upon the jury. The court reasoned further that Henrietta Henderson's testimony showed the guilt of the defendant, saying it showed his connection step by step. In other words, that her testimony was just as strong without the sheriff's as it would have been with the Sheriff's. The court adopted her statement in toto, although a number of witnesses, disinterested and of good

standing, from Greenville, South Carolina, and Spartanburg, South Carolina, showed an alibi for the accused throughout the entire time when Henrietta Henderson accused him, in the proceeding before the Sheriff and in her testimony, of being in her home connected with the crime charged. The court then uses the admission of the defendant in conversation with the Sheriff and Henrietta Henderson, (or on the witness stand, when the Judge had directed him to testify), to the effect that the Crawford girl had been employed by him four months before her death, and that she had her living quarters there, together with other circumstances testified to by Henrietta Henderson, and admitted in part by him, (as paying the bonding fee, and asking Henrietta Henderson to go to his attorneys' office and state what she told him as the truth), all deemed by the court as incriminating, to show, along with other circumstances mentioned by the court, that the defendant was guilty beyond a reasonable doubt, even holding that the purpose of the accused was to suppress the testimony of Henrietta Henderson. The stenographer who wrote the statement testified to the contrary. The inferences to be drawn from the circumstances detailed and from the testimony admissible, were for a jury; and not for a law court. And when the Supreme Court has held that, even where no objection to such testimony is made, and no exception thereto is taken, the court will, of its own motion, declare such testimony inadmissible and reverse the judgment below.

In the case of *State* v. *Griffin*, 124 S. E. 81, 129 S. C. 200, the South Carolina Supreme Court said:

> "This court is bound in a capital case (and we may think equally so in a case of felony involving the deprivation of the defendant's liberty), to take notice in behalf of the accused of any error apparent upon the

record by which the prisoner has been deprived of any of the substantial means of enjoying a fair and impartial trial," quoting from *State* v. *McNinch,* 12 S. C. 89.

In the same case (*State* v. *Griffin*), Justice Cothran, delivering the opinion of the court, says that:

> "The privilege, we think, should be extended even further than this, and held to cover testimonial compulsion under any circumstances. The line of cleavage is whether the proposed evidence is the testimony of the defendant or evidence in itself unaided by any statement of the defendant."

Hence, for the foregoing additional reason Sheriff Henry's testimony, as well as any admissions gained from the testimony of the defendant, after he was ordered to take the stand, were inadmissible and prejudicial, and should have warranted a new trial. Testimony obtained in this manner was held in the foregoing case to be so. The Court, in ordering a new trial in said *Griffin* case said:

> "We are of opinion, therefore, that the evidence referred to in the second question, above stated, was inadmissible and prejudicial, and its admission constituted reversible error." S. E. 124 page 87.

The *Griffin* case was where the defendant was charged with attempting to administer poison to another, and the exception sustained was to the testimony of the Sheriff to the effect that he compelled the defendant to put her foot in the track (she was suspected of making), and that she would not do it in the right way.

The Constitution of the State of 1895, Art. 1, Sec. 25, provides:

> "The right of trial by jury shall be preserved inviolate."

Sec. 5 (same Constitution) provides:

> "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property, without due process of law, nor shall any person be denied the equal protection of the law."

Sec. 17 (same Constitution) provides:

> "* * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself, * * *."

Sec. 4, Art. 5, State Constitution 1895, declared:

> "The Supreme Court * * * shall constitute a court for the correction of errors at law under such regulation as the General Assembly may, by law, prescribe."

Sec. 26 (D) S. C. Code 1942, provides:

> "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases."

In the case of *Whisenhunt* v. *Atlantic Coast Line Railroad Company,* 10 S. E. 2d, 316, — S. C. —, the Supreme Court of South Carolina said:

> "The questions raised by the testimony were jury issues, and were properly submitted to the jury. The function of this court is not to try cases on the facts, but correct errors of law on appeal. Constitution of 1895, Art. 5, Sec. 4, Rylee *v.* Marett, 121 S. C. 366, 377; 113 S. E. 483."

The constitutional and statutory provisions aforesaid show clearly, that when the Supreme Court of this State finds upon the facts, it is violating due process, and deny-

ing the accused the equal protection of the law, especially so when it failed to follow the *Griffin* case, holding such testimony inadmissible and prejudicial.

In *Securities & Exchange Commission* v. *Chenery Corp.*, 63 S. Ct. 459 (Adv. S. Feb. 15, 1943), this Court held:

> "* * * But it is also familiar appellate procedure that where the correctnes of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. * * *"

The Article of the United States Constitution referred to in the brief before the State Supreme Court (Amendment 5), also declares that the accused shall not be "compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. * * *"

SUBDIVISION B.

The rule of the Circuit Court of South Carolina, the Sessions Division of which the defendant was being tried in, provides:

> "Counsel shall not attempt to argue or explain a case, or any matter arising therein, after he has been heard and the opinion of the Court has been pronounced". Rule 7.

When the Presiding Judge ruled, before counsel could complete his motion, it would have been contempt of court to argue the question further. This, we contend, was a denial of due process to petitioner when, under such circumstances, the Presiding Judge ordered the defendant to take the stand and testify. The constitution of South Carolina says, (Art. 1, Sec. 18):

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impar-

tial jury, and to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel, or by both."

It does not require more than a glance at the attempt of Mr. Brown to make his motion and state the grounds thereof, and the decision and order of the judge, to determine that the accused was not "fully heard in his defense by himself or by his counsel, or by both", when it was the purpose of Mr. Brown, after having worked all day and examined more than a dozen witnesses, to tell the court how he had planned to eliminate some of the work, and what his plan of conducting the defense would be if the court would give him an adjournment five minutes before the time previously set for the evening adjournment.

Moreover, the Constitution of this State, as above indicated (Art. 1, Sec. 17) declares: No person shall "be compelled in any criminal case to be a witness against himself."

A Statute (1011 of the S. C. Code of 1942) provides:

"In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case."

In the case of *State* v. *Howard*, 35 S. C. 203, 14 S. E. 481, the Supreme Court of this State said:

"* * * To our minds, these two provisions, one of our constitution and the other of our statute law, look to an absolute freedom of defendants, in all criminal cases, as to testifying; the former indicates that such a one shall not be forced to testify, while the latter is purely permissive, provided he chooses to do so. This being the case, it almost of necessity follows that nothing shall result to his prejudice from a failure to testify."

The Constitution of the United States (Art. 5), declares that no defendant "* * * shall be compelled in any criminal case to be a witness against himself." * * *

And Article 6, United States Constitution provides:

> That the accused shall "* * * have the assistance of counsel for his defense."

The Court has observed, no doubt, that the State Constitution extends the privilege of due process and equal protection of the laws to "citizens of this State and of the United States under this Constitution * * *". Sec. 5, Art. 1, Constitution South Carolina 1895.

Construing the effect of ordering a defendant to testify, regardless of whether the testimony was prejudicial or not, though it will be recalled that in the *Griffin* case, *supra*, the State Supreme Court did say it was prejudicial, in the case of *Town Council* v. *Owens*, 61 S. C. 24, the Supreme Court of South Carolina said:

> "One of the grounds of appeal presented by Dr. J. M. Owens goes to the root of the matter of his conviction, viz: that he was required to give testimony while he was on trial for a crime. Sec. 17, of art. 1, of our State Constitution, provides: '* * * nor shall he be compelled in any criminal case to be a witness against himself.' He was the only witness sworn. While we do not express any opinion as to the effect of his testimony, still we are bound to reverse the judgment against him on the ground that he was compelled to testify aaginst himself. Because the defendant made no objection to his being sworn and no objection as to his testifying, does not alter his constitutional right. A man might subject himself to punishment for contempt, if he objected to testifying when forced or called upon to do so. It is not in accord with the orderly administration of justice to swear a defendant as a witness against himself in any Court; indeed; as we have seen, the Constitution forbids it." * * *

It will be noted in the record of petitioners that he never at any time offered to testify, nor did his counsel offer him

as a witness; but when asked if he was going to testify, started to tell what he had in mind after examining a witness that he had, when the Court said for him to put the defendant up. In the *Owens* case, the Supreme Court of this State refused to go into the question of whether it was prejudicial or not, but said it was not orderly procedure and that there must be a new trial.

That this is one of the substantial rights enjoyed by a defendant is generally recognized by the courts of all the States; and there is no stage of the trial where the defendant needs to confer with his counsel more than after the close of a day of testimony, where there was no decision between counsel and client as to what the procedure would be thenceforward; and when the court ordered the defendant to the stand without allowing his counsel to be heard, and without the advice and privilege of consultation with his attorney, we submit that the accused was denied due process.

In addition to the general recognition of this right by the States, in the case of *Johnson* v. *Zerbst*, 58 S. Ct. 1002, 304 U. S. 463, the Supreme Court says, referring to the accused:

> "* * * He requires the guiding hand of counsel at every step in the proceeding against him. * * *"

SUBDIVISION C.

The Supreme Court of the State, although not calling them specifically by name and number, passing upon the protective constitutional provisions, State and Federal, said, in speaking of the trial court, when the Presiding Judge forced the defendant to the stand:

> "The action of the Court exhibited nothing more than a desire to facilitate the progress of the trial, and, in our opinion, was not indicative of any intention to force the defendant to take the stand in violation of his constitutional right not to testify if he chose not to do so."

The cases cited hereinabove show that this violates both Federal and State Constitutional provisions, and that the Supreme Court of this State has reversed judgments heretofore without even inquiring whether the accused was prejudiced. The record shows that neither counsel nor accused, in the instant case, expressed any desire or intention that the defendant testify. The decisions of this State hold that where one gives evidence against himself, when testifying against his constitutional privilege, that the court will reverse the judgment as prejudicial without even examining to see what the extent of the injury or prejudice might have been. Believing, and respectfully submitting, that the petitioner has not had that orderly trial that due process would have given him, we submit that the writ should issue and that the judgment and sentence of the Sessions Court of Spartanburg County should be reversed.

In the case of *Mooney* v. *Holohan,* 98 A. L. R. 410, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, this Court said:

> "* * * Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542, 546, 4 S. Ct. 544." * * *

Conclusion.

For the reasons set forth above, it is respectfully submitted that this case is one which justifies the granting of a writ of certiorari and thereafter reviewing and reversing the adverse judgments involved, and that the writ prayed for should be granted.

June 26, 1943.

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